

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JULIA M. JONES,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

NO. C10-992-RSM-JPD

REPORT AND
RECOMMENDATION

Plaintiff Julia M. Jones appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, plaintiff was a fifty-two-year-old woman with a high school education. Administrative Record (“AR”) at 21-22. Her past work experience includes employment as a bookkeeper between 1990 and 1994, and a customer service representative for a health care insurance business between 1994 and 2005. AR at 36. Plaintiff was last gainfully employed in December 2005. AR at 9, 88-92, 99, 103.

1 Plaintiff asserts that she is disabled due to severe back pain and severe chronic pain
2 secondary to fibromyalgia, which she alleges prevent her from sitting or standing sufficiently
3 to maintain employment. AR at 99, 103. She asserts an onset date of December 16, 2005. AR
4 at 99, 103.

5 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 42-
6 44, 47-48. Plaintiff requested a hearing, which took place on February 7, 2008. AR at 17-39.
7 On April 18, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits
8 based on his finding that plaintiff could perform her past relevant work as a benefits clerk and
9 reception clerk. AR at 6-16.

10 Plaintiff's request for review by the Appeals Council was denied on May 13, 2010, AR
11 at 1-5, making the ALJ's ruling the "final decision" of the Commissioner as that term is
12 defined by 42 U.S.C. § 405(g). On June 21, 2010, plaintiff timely filed the present action
13 challenging the Commissioner's decision. Dkt. 3.

14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
16 405(g) and 1383(c)(3).

17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
19 social security benefits when the ALJ's findings are based on legal error or not supported by
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
21 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
22 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
23 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
24 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
25 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
26 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

1 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
 2 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
 3 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
 4 must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed
 6 and further administrative proceedings would serve no useful purpose." *McCartey v.*
 7 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 8 (9th Cir. 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 10 claimant's evidence; (2) there are no outstanding issues that must be resolved
 11 before a determination of disability can be made; and (3) it is clear from the
 12 record that the ALJ would be required to find the claimant disabled if he
 considered the claimant's evidence.

13 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 14 erroneously rejected evidence may be credited when all three elements are met).

15 IV. EVALUATING DISABILITY

16 As the claimant, Ms. Jones bears the burden of proving that she is disabled within the
 17 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
 18 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
 19 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
 20 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
 21 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
 22 are of such severity that she is unable to do her previous work, and cannot, considering her age,
 23 education, and work experience, engage in any other substantial gainful activity existing in the
 24 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
 25 99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
9 or more medically severe impairments, or combination of impairments, that limit her physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment meets
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
22 true, then the burden shifts to the Commissioner at step five to show that the claimant can
23 perform other work that exists in significant numbers in the national economy, taking into
24 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§

25
26 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves significant
physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
 2 claimant is unable to perform other work, then the claimant is found disabled and benefits may
 3 be awarded.

4 V. DECISION BELOW

5 On April 14, 2008, the ALJ issued a decision finding the following:

- 6 1. The claimant meets the insured status requirements of the Social
 7 Security Act through December 31, 2010.
- 8 2. The claimant has not engaged in substantial gainful activity since
 9 December 16, 2005, the alleged onset date.
- 10 3. The claimant has the following severe impairments: fibromyalgia and
 11 degenerative disc disease of the lumbar spine.
- 12 4. The claimant does not have an impairment or combination of
 13 impairments that meets or medically equals one of the listed
 14 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 15 5. After careful consideration of the entire record, I find that the claimant
 16 has the residual functional capacity to perform sedentary work as
 17 defined in 20 CFR 404.1567(1) except she can stand/walk four hours
 18 in a eight-hour day in 20 minute increments and she can sit four hours
 19 in an eight-hour day. She cannot perform repetitive pushing/pulling
 20 with the upper extremities. She can occasionally climb stairs, balance,
 21 stoop, kneel, crouch and crawl. She cannot climb ladders. She cannot
 22 work around heights or hazards and much (sic) avoid extreme
 23 temperatures and wetness/dampness. Considering the effects of her
 24 multiple medications, she can perform detailed but not complex tasks.
- 25 6. The claimant is capable of performing past relevant work as a benefit
 26 clerk and reception clerk. This work does not require the performance
 of work-related activities precluded by the claimant's residual
 functional capacity.
7. The claimant has not been under a disability, as defined in the Social
 Security Act, from December 16, 2005 through the date of this
 decision.

AR at 11-15.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Did the ALJ properly evaluate the opinion of examining physician Mark Heilbrunn, M.D., as well as the findings of the state agency?
2. Did the ALJ err by failing to provide clear and convincing reasons for rejecting plaintiff's testimony regarding her pain and limitations?
3. Did the ALJ err at step four by finding that plaintiff can perform her past relevant work?
4. Did the ALJ err by relying on testimony of the vocational expert without establishing that his testimony was consistent with the Dictionary of Occupational Titles?

Dkt. 15 at 6-18; Dkt. 22 at 1-2.

VII. DISCUSSION

A. The ALJ Erred in Evaluating the Medical Opinion Evidence

1. *Standards for Reviewing Medical Evidence*

As a matter of law, more weight is given to a treating physician's opinion than to that of a non-treating physician because a treating physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his conclusions. "He must set forth his own interpretations and explain why they,

1 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
2 Cir. 1988)). Such conclusions must at all times be supported by substantial evidence. *Reddick*,
3 157 F.3d at 725.

4 The opinions of examining physicians are to be given more weight than non-examining
5 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
6 uncontradicted opinions of examining physicians may not be rejected without clear and
7 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
8 physician only by providing specific and legitimate reasons that are supported by the record.
9 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

10 Opinions from non-examining medical sources are to be given less weight than treating
11 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
12 opinions from such sources and may not simply ignore them. In other words, an ALJ must
13 evaluate the opinion of a non-examining source and explain the weight given to it. Social
14 Security Ruling ("SSR") 96-6p, 1996 WL 374180, at *2. Although an ALJ generally gives
15 more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a
16 non-examining doctor's opinion may nonetheless constitute substantial evidence if it is
17 consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947,
18 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632-33.

19 2. *Dr. Heilbrunn's March 2006 Medical Opinion and the State Agency's Findings*

20 Plaintiff argues that the ALJ "failed to provide reasons specific to the actual limitations
21 in plaintiff's shoulders, elbows and wrists Dr. Heilbrunn identified on exam, which would
22 result in reaching limitations and keyboard limitations. Nor did the ALJ provide reasons
23 specific to the rejection of the lifting limitation Dr. Heilbrunn identified." Dkt. 15 at 15.
24 Plaintiff also challenges the ALJ's rejection of Dr. Heilbrunn's diagnosis of hip pain, on the
25 grounds that other physicians have attributed plaintiff's hip pain to her fibromyalgia. *Id.* at 16.
26 The Commissioner responds that the ALJ properly provided specific and legitimate reasons for

1 rejecting some of Dr. Heilbrunn's opinions regarding plaintiff's limitations. *See* Dkt. 22 at 11-
2 12.

3 On March 2, 2006, Dr. Heilbrunn conducted a consultative disability examination of
4 plaintiff that included reviewing some prior medical records, as well as performing a physical
5 examination that included range of motion testing. AR at 225-30. Dr. Heilbrunn noted that
6 plaintiff's chief complaints are low back pain, fibromyalgia, bilateral hip pain, and bilateral
7 knee pain. AR at 225. He also noted that plaintiff "appeared fatigued. Her movements are
8 very slow and appear painful. She had difficulty and required assistance in putting her pants
9 on . . . She needed assistance when mounting or dismounting the examination table." AR at
10 227. Dr. Heilbrunn concluded that plaintiff "manifests a postural range of motion limitation of
11 her lumbar back, neck, and hips. She has a manipulative range of motion limitation of both
12 shoulders, and both elbows in flexion. She has decreased range of motion of the wrists in ulnar
13 deviation." AR at 229.

14 Based upon his physical examination, Dr. Heilbrunn opined that plaintiff "would have a
15 limitation in standing or walking to 20 minutes uninterrupted, and for a cumulative length of
16 time of 3-4 out of 8 hours. She has a limitation in lifting to a maximum of 2 pounds with either
17 hand on an occasional basis." AR at 229. He also found that plaintiff can "sit for at least 20-
18 30 minutes uninterrupted, as manifested in the examination, and for a cumulative length of
19 time of 5-6 hours in an 8-hour work period, with limitations secondary to lumbar degenerative
20 joint disease." AR at 230. With respect to plaintiff's ability to use her hands for work related
21 activities, Dr. Heilbrunn found that plaintiff can perform "firm grasping, manipulating, and
22 fine and dexterous movements; she would not be able to accomplish constant or frequent
23 overhead movements with either arm . . . She would have some limitation with frequent
24 movements of the wrist secondary to decreased wrist range of motion." AR at 230.

25 In determining plaintiff's RFC, the ALJ summarized Dr. Heilbrunn's findings, as well
26 as the findings of the non-examining state agency analyst, Manuel Oaxaca, SDM, who

1 disagreed with many of Dr. Heilbrunn's conclusions. AR at 15, 225-30, 234-41. The ALJ also
2 noted that "the State agency medical consultant, Timothy J. Smith, M.D., affirmed the residual
3 functional capacity assessment [of Mr. Oaxaca] as written." AR at 15, 249. After
4 summarizing these conflicting medical opinions, the ALJ declined to fully adopt the opinions
5 of either Dr. Heilbrunn or the state agency. The ALJ asserted that "I agree [with Mr. Oaxaca]
6 that the claimant is not as limited as described by Dr. Heilbrunn; however, I find that she
7 cannot perform work at a light exertional level as assessed by the State agency." AR at 15.
8 The ALJ concluded that "physically, giving the claimant the benefit of the doubt, she retains a
9 capacity for sedentary work." AR at 15. Thus, the ALJ implicitly found that plaintiff can lift
10 up to 10 pounds at a time. *See* 20 C.F.R. § 404.1567(a) ("Sedentary work involves lifting no
11 more than 10 pounds at a time and occasionally lifting or carrying articles like docket files,
12 ledgers, and small tools.").

13 The Court agrees with plaintiff that the ALJ committed reversible error by failing to
14 explain the weight he afforded to these conflicting medical opinions. Although neither party
15 addresses this issue in their briefing, the Court also finds that the ALJ erred by failing to
16 explain the weight afforded to the opinions of Mr. Oaxaca and Dr. Smith, although they are not
17 treating or examining physicians. *See* SSR 96-6p, 1996 WL 374180, *2 (providing that an
18 ALJ may not ignore state agency medical consultants' opinions "and must explain the weight
19 given to these opinions in their decisions.").

20 In addition, the ALJ erred by failing to provide specific and legitimate reasons for
21 rejecting some of Dr. Heilbrunn's opinions. Specifically, the ALJ failed to provide any reason
22 for rejecting Dr. Heilbrunn's finding that plaintiff can only lift two pounds in each hand
23 occasionally, and may have secondary limitations stemming from her limited range of motion
24 in her shoulders, elbows, and wrists.² The Court cannot conclude that this error was harmless,

25 ² The Court notes that Dr. Heilbrunn did not state that plaintiff was unable to reach, but found
26 that plaintiff could not "accomplish constant or frequent overhead movements[.]" AR at 230.
Similarly, Dr. Heilbrunn did not opine that plaintiff was unable to keyboard, but asserted that she may

1 because when the ALJ asked the vocational expert (“VE”) if plaintiff would be prohibited from
 2 performing her past relevant work if the ALJ credited Dr. Heilbrunn’s March 2006 finding that
 3 plaintiff can only lift a maximum of two pounds with each hand on an occasional basis, the VE
 4 responded in the affirmative. AR at 38. Although the ALJ “need not discuss *all* evidence
 5 presented” to him or her, the ALJ must explain why “significant probative evidence has been
 6 rejected.” *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984)
 7 (citation omitted) (emphasis in original). *See also Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd
 8 Cir. 1981); *Garfield v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984). Because the VE testified
 9 that Dr. Heilbrunn’s opinions, if fully credited by the ALJ, would indicate that plaintiff is
 10 unable to perform her past relevant work, the Court finds that Dr. Heilbrunn’s medical
 11 opinions constituted “significant probative evidence” that the ALJ needed to provide adequate
 12 reasons for rejecting. AR at 37-38. The ALJ did not articulate any reasons, let alone specific
 13 and legitimate ones, for declining to adopt all of Dr. Heilbrunn’s findings in this case.³

14 The Court is unpersuaded by the Commissioner’s argument that the ALJ effectively
 15 “adopted” the state agency analyst’s criticism of Dr. Heilbrunn’s findings. Dkt. 22 at 11. The
 16 ALJ made no such statement. As discussed above, the ALJ summarized Mr. Oaxaca’s RFC
 17 assessment, just as he summarized Dr. Heilbrunn’s findings, and then declined to fully adopt
 18 either opinion without further explanation. AR at 15. In any event, in the absence of other
 19 independent evidence in the record, the opinions of Mr. Oaxaca or Dr. Smith are insufficient to
 20 warrant the rejection of Dr. Heilbrunn’s findings. *See Lester v. Chater*, 81 F.3d 821, 830 (9th
 21 Cir. 1995) (providing that a non-examining medical advisor’s testimony, without more, does

22 have “some limitation with frequent movements of the wrist secondary to decreased wrist range of
 23 motion.” AR at 230. *See also* AR at 113, 131 (function reports submitted by plaintiff and plaintiff’s
 24 husband, providing that plaintiff is able to play computer games “often.”).

25 ³ The Court notes one exception, as the ALJ did explain why he discredited Dr. Heilbrunn’s
 26 diagnosis of hip degenerative joint disease at step two. AR at 12. Specifically, the ALJ stated that
 although “the diagnosis of fibromyalgia and lumbar spine degenerative disc disease are medically
 established . . . Dr. Heilbrunn did not review any hip x-rays. In February 2004, x-rays of both hips
 showed no abnormal findings.” AR at 12. This was a specific and legitimate reason, supported by
 substantial evidence, to reject Dr. Heilbrunn’s opinions regarding plaintiff’s hips. AR at 198-99.

1 not constitute substantial evidence that warrants rejection of either a treating or examining
2 doctor's opinion).

3 Finally, the Court finds that the Commissioner's remaining arguments attempt to
4 supply a post-hoc rationale for the ALJ's conclusion. Dkt. 22 at 11-12. These efforts are
5 unavailing. A reviewing court cannot affirm the denial of benefits based on a reason not stated
6 or findings that were not made by the ALJ. *See Pinto v. Massanari*, 249 F.3d 840, 847-48 (9th
7 Cir. 2001) ("[I]f the Commissioner's contention invites this Court to affirm the denial of
8 benefits on a ground not invoked by the Commissioner in denying benefits originally, then we
9 must decline.").

10 Accordingly, the ALJ erred by failing to provide specific and legitimate reasons for
11 rejecting Dr. Heilbrunn's opinions, as well as explaining the weight afforded to the state
12 agency's findings. This matter must be remanded for further administrative proceedings. On
13 remand, the ALJ is directed to reevaluate the medical opinion evidence in the record, and
14 reassess plaintiff's RFC.

15 B. The ALJ Erred In Assessing an Adverse Credibility Determination

16 As noted above, credibility determinations are within the province of the ALJ's
17 responsibilities, and will not be disturbed unless they are not supported by substantial
18 evidence. A determination of whether to accept a claimant's subjective symptom testimony
19 requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR
20 96-7p. First, the ALJ must determine whether there is a medically determinable impairment
21 that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.
22 §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant
23 produces medical evidence of an underlying impairment, the ALJ may not discredit the
24 claimant's testimony as to the severity of symptoms solely because they are unsupported by
25 objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc);
26 *Reddick*, 157 F.3d at 722. Absent affirmative evidence showing that the claimant is

1 malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant’s
2 testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

3 When evaluating a claimant’s credibility, the ALJ must specifically identify what
4 testimony is not credible and what evidence undermines the claimant’s complaints; general
5 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may
6 consider “ordinary techniques of credibility evaluation” including a reputation for truthfulness,
7 inconsistencies in testimony or between testimony and conduct, daily activities, work record,
8 and testimony from physicians and third parties concerning the nature, severity, and effect of
9 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*
10 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

11 In this case, the ALJ did not conclude that plaintiff was malingering. The ALJ found
12 that “the claimant’s medically determinable impairments could reasonably be expected to
13 produce some of the alleged symptoms; however, the claimant’s statements concerning the
14 intensity, persistence and limiting effects of these symptoms are not credible to the extent they
15 are inconsistent with the residual functional capacity assessment for the reasons explained
16 below.” AR at 14. The ALJ offered two reasons to support this decision: (1) plaintiff’s
17 subjective complaints regarding her pain and the limiting effects of her symptoms were not
18 corroborated by objective signs and findings in the record; and (2) Dr. Ramsbottom noted in
19 June 2007 that plaintiff was able to “get up and get things done” when she took a combination
20 of methadone and hydrocodone. Plaintiff contends that these are not “clear and convincing
21 reasons” for discrediting her testimony. Dkt. 24 at 10.

22 The Court agrees with plaintiff that the ALJ’s first reason for rejecting plaintiff’s
23 testimony, that “the evidence documents a lot of pain complaints and little by way of objective
24 signs and findings,” AR at 14, is not “clear and convincing” because the ALJ applied an
25 inappropriate legal standard. Dkt. 24 at 10. As discussed above, once a plaintiff has produced
26 medical evidence of an underlying impairment, the ALJ may not discredit the claimant’s

1 testimony as to the severity of symptoms solely because they are unsupported by objective
2 medical evidence. *See Bunnell*, 947 F.2d at 347-48; *Reddick*, 157 F.3d at 722. Because the
3 ALJ concluded at step two that plaintiff's fibromyalgia and degenerative spinal disease
4 constituted severe impairments, the ALJ could not thereafter discredit plaintiff's testimony
5 regarding the severity of her pain or symptoms on the grounds that her testimony was
6 unsupported by objective medical evidence.

7 In addition, the Court finds the ALJ's attempt to discount plaintiff's subjective
8 complaints based upon the lack of corroborating objective evidence to be particularly
9 egregious in light of the ALJ's acknowledgement that plaintiff suffers from severe
10 fibromyalgia. Fibromyalgia is a disease that is notable for its lack of objective diagnostic
11 techniques. *See Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996). Specifically, the Ninth
12 Circuit has recognized that "[fibromyalgia]'s cause or causes are unknown, there is no cure,
13 and, of greatest importance to disability law, its symptoms are entirely subjective. There are
14 no laboratory tests for the presence or severity of fibromyalgia." *Rollins v. Massanari*, 261
15 F.3d 853, 855 (9th Cir. 2001) (citing *Sarchet*, 78 F.3d at 306). Put differently, "the absence of
16 swelling joints or other orthopedic and neurologic deficits is no more indicative that the
17 patient's fibromyalgia is not disabling than the absence of a headache is an indication that a
18 patient's prostate cancer is not advanced." *Green-Younger v. Barnhart*, 335 F.3d 99, 109 (2d
19 Cir. 2003) (internal quotation omitted). As a result, the ALJ erred in this case by "effectively
20 requir[ing] objective evidence for a disease that eludes such measurement." *Benecke v.*
21 *Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (internal citations omitted).

22 This does not mean that every claimant asserting fibromyalgia receives a pass to a
23 disability finding. It does mean, however, that an ALJ who does not consider a plaintiff
24 suffering from fibromyalgia to be credible must specifically identify what testimony is not
25 credible and what evidence undermines the claimant's complaints by employing ordinary
26 techniques of credibility evaluation. *See Smolen*, 80 F.3d at 1284.

1 The second reason for discounting plaintiff's testimony proffered by the ALJ was Dr.
2 Ramsbottom's June 2007 treatment note indicating that when plaintiff takes a combination of
3 hydrocodone and methodone, "she is able to get up and get things done" despite her back pain.
4 AR at 268. The ALJ concluded that "the lack of ongoing significant examination findings and
5 the claimant's report that she can get up and get things done on her medication regimen
6 support a capacity for at least sedentary work." AR at 14.

7 However, contrary to this conclusion, as well as the ALJ's assertion that "Dr.
8 Ramsbottom did not note any abnormalities on examination . . . on follow up [in] November
9 2007," Dr. Ramsbottom's November 12, 2007 treatment note indicated that plaintiff's current
10 medication regimen was not effectively controlling plaintiff's symptoms and pain. AR at 14.
11 Specifically, Dr. Ramsbottom noted that since plaintiff's June 2007 visit, plaintiff was
12 experiencing back spasms and "increasing problems sleeping, particularly because of the
13 pain." AR at 267. As a result of plaintiff's increasing symptoms, plaintiff asked Dr.
14 Ramsbottom "if there is anything else that she can do to help with the severe pain and
15 spasming." AR at 267. In response, Dr. Ramsbottom "discussed options for helping to modify
16 the pain," and prescribed additional medications for use when plaintiff experiences back
17 spasms or "when she has severe pain breakthrough." AR at 267. Dr. Ramsbottom also
18 commented that plaintiff was "relatively disabled" by her spinal disorder and "has been unable
19 to work for the past year." AR at 267. In light of this conflicting evidence, without more, the
20 Court cannot uphold the ALJ's finding that plaintiff's "medication regimen support[s] a
21 capacity for at least sedentary work." AR at 14.

22 Accordingly, the Court finds that the two reasons proffered by the ALJ are not "clear
23 and convincing reasons" for discrediting plaintiff's testimony concerning the severity and
24 limitations resulting from her symptoms and pain. On remand, the ALJ is directed to conduct
25 further findings evaluating the credibility of plaintiff's subjective complaints, and reassess
26 plaintiff's credibility in light of the direction provided by this opinion.

1 C. On Remand, the ALJ is Directed to Reevaluate Whether Plaintiff Can Perform
2 Her Past Relevant Work or a Job Existing in the National Economy

3 Plaintiff argues that the ALJ erred in finding that plaintiff could perform her past
4 relevant work because it is sedentary work and therefore requires the ability to sit for at least
5 six hours out of an eight-hour workday, when the ALJ concluded that plaintiff has the RFC to
6 sit for only four hours maximum. Dkt. 24 at 6. In addition, plaintiff argues that the VE's
7 testimony that plaintiff could still perform her past relevant work, AR at 37, deviated from the
8 Dictionary of Occupational Titles ("DOT") because "the two jobs the VE identified are both
9 defined as 'sedentary' jobs by the DOT" and therefore "the VE's testimony . . . is patently
10 erroneous [as] a person must be able to sit for 6 hours to do such work." Dkt. 15 at 10-11. *See*
11 *also* SSR 83-10, 1983 WL 31251, *5 (providing that with respect to sedentary work, "periods
12 of standing or walking should generally total no more than about 2 hours of an 8-hour
13 workday, and sitting should generally total approximately 6 hours of an 8-hour workday.
14 Work processes in specific jobs will dictate how often and how long a person will need to be
15 on his or her feet[.]").

16 The Commissioner contends that "the primary source of information regarding a
17 claimant's past relevant work comes from the claimant, [and] a vocational expert's testimony
18 can be useful but is not required at step four if the claimant fails to show that she was unable to
19 return to her past relevant work as it was actually or generally performed." Dkt. 22 at 15
20 (citing *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993)). The Commissioner argues that
21 in this case, "the ALJ properly relied on Plaintiff's reports regarding her past relevant work and
22 proposed a valid [RFC] hypothetical to the vocational expert . . . Plaintiff's argument that the
23 ALJ erred in determining that she could not return to her past relevant work as it is generally
24 performed ignores that she is capable of returning to her past relevant work as it was actually
25 performed." Dkt. 22 at 15. Because "Plaintiff reported that both [of her prior relevant] jobs
26 required her to sit less than 4 hours a day . . . the ALJ properly determined that Plaintiff could

1 perform her past relevant work as she actually performed the jobs.” *Id.* at 15-16. Plaintiff
2 responds that “[t]here is a patent conflict in the evidence [establishing] how much sitting
3 Plaintiff actually did in her past relevant work.” Dkt. 24 at 6. *Compare* AR at 104 (plaintiff’s
4 report that her customer service job involved sitting for 8 hours a day), with AR 119-20
5 (plaintiff’s report that her customer service job involved sitting for 3.5 hours a day, and her
6 bookkeeper job involved sitting for 3 hours a day).

7 Contrary to plaintiff’s argument, “the mere inability to perform substantially all
8 sedentary unskilled occupations does not equate with a finding of disability.” SSR 96-9p, 1996
9 WL 374185, *4. Specifically, “if an individual is unable to sit for a total of 6 hours in an 8-
10 hour work day, the unskilled sedentary occupational base will be eroded. The extent of the
11 limitation should be considered in determining whether the individual has the ability to make
12 an adjustment to other work.” *Id.* at *6. The regulations recognize, however, that “[t]here may
13 be a number of occupations . . . and jobs that exist in significant numbers, that an individual
14 may still be able to perform even with a sedentary occupation base that has been eroded.” *Id.*
15 at *4. Thus, in cases such as this one, where an ALJ determines that a claimant is unable to
16 perform the full range of sedentary work, the ALJ must “cite examples of occupations or jobs
17 the individual can do and provide a statement of the incident of such work in the region where
18 the individual resides or in several regions of the country.” *Id.* at *5.

19 Because this case is already being remanded for reevaluation of the medical opinion
20 evidence as well as plaintiff’s RFC, it is unnecessary to determine whether the ALJ erred by
21 concluding that “[i]n comparing the claimant’s residual functional capacity with the physical
22 and mental demands of [her past relevant] work . . . the claimant is able to perform it as
23 actually and generally performed.” AR at 15. However, on remand, if the ALJ concludes that
24 plaintiff is capable of performing less than a full range of sedentary work, the ALJ is directed
25 to solicit additional testimony from the plaintiff at the hearing regarding her past relevant work
26 before concluding that she is able to perform it as actually performed. Moreover, the ALJ is

1 directed to solicit testimony from a VE that is consistent with the DOT before concluding that
2 plaintiff is able to perform her past relevant work as it is generally performed, or concluding
3 that plaintiff is able to perform other jobs existing in significant numbers in the national
4 economy.

5 D. On Remand, the ALJ is Directed to Comply with SSR 00-4p.

6 Plaintiff alleges that the ALJ failed to comply with SSR 00-4p because he did not ask
7 the VE during the hearing whether his testimony was consistent with the Dictionary of
8 Occupational Titles (“DOT”). Dkt. 15 at 10. The Commissioner responds that “the ALJ did
9 not need to determine whether the vocational expert’s testimony was consistent with the
10 [DOT] because the ALJ did not rely on the DOT to determine that Plaintiff could perform her
11 past relevant work as she actually performed it.” Dkt. 22 at 16.

12 SSR 00-4p provides that whenever “a VE or [vocational specialist (“VS”)] provides
13 evidence about the requirements of a job or occupation, the [ALJ] has an affirmative
14 responsibility to ask about any possible conflict between that VE or VS evidence and
15 information provided in the DOT.” SSR 00-4p, 2000 WL 1898704, at *4. Specifically, the
16 ALJ must ask whether the evidence provided conflicts with information provided in the DOT,
17 and if it does, “obtain a reasonable explanation for the apparent conflict.” *Id.*

18 As discussed above, the Court need not determine whether the ALJ erred at step four
19 because this case is already being remanded for further proceedings. If the ALJ considers
20 testimony from a VE or VS on remand, however, the ALJ is directed to make an appropriate
21 inquiry in accordance with SSR 00-4p to determine whether the testimony conflicts with the
22 DOT. If it does, the ALJ must obtain a reasonable explanation for the conflict before relying
23 on that testimony at steps four or five of the sequential evaluation process. *See id.*

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

DATED this 25th day of February, 2011.

A handwritten signature in black ink that reads "James P. Donohue". The signature is written in a cursive style with a large, looping initial "J".

JAMES P. DONOHUE
United States Magistrate Judge